

Exploring the Concept of Power in Mediation: Mediators' Sources of Power and Influence Tactics

OMER SHAPIRA*

I. INTRODUCTION

Mediators have power. They use their power during mediation to help the parties to communicate with each other, to change their positions, and to come to an agreement. What do we know about mediators' sources of power? How do mediators construct a power position and increase their power? How do mediators use their power in the exercise of their role?

Mediation literature describes the process of mediation, analyzes it, and offers practical guidance for mediators.¹ Yet it seems that a comprehensive review of the concept of power in mediation has not been made yet. True, the term "power" is often employed in academic literature on mediation, and is used in the discussion of various aspects of mediation. For example, the "power of mediation" is used to describe the advantages of mediation over other conflict resolution processes,² there is a large volume of writing on power imbalances between the parties in mediation,³ and power is discussed

* Senior Lecturer, Ono Academic College, Faculty of Law.

¹ See, e.g., LAURENCE BOULLE & MIRYANA NESIC, *MEDIATION: PRINCIPLES PROCESS PRACTICE* (2001); ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994); JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984); STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (2d ed. 1992); KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* (3d ed. 2004); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (3d ed. 2003).

² See, e.g., Alexandra Alvarado Bowen, *The Power of Mediation to Resolve International Commercial Disputes and Repair Business Relationships*, *DISP. RESOL. J.*, May–July 2005, at 58.

³ See, e.g., Jordi Agustí-Panareda, *Power Imbalances in Mediation: Questioning Some Common Assumptions*, *DISP. RESOL. J.*, May–July 2004, at 24; Ilan G. Gewurz, *(Re)Designing Mediation to Address the Nuances of Power Imbalance*, 19 *CONFLICT RESOL. Q.* 135 (2001); Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 *GEO. J. LEGAL ETHICS* 553 (1995); Joan B. Kelly, *Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention*, 13 *MEDIATION Q.* 85 (1995).

in the context of the fairness of the process,⁴ the empowerment of the parties,⁵ intercultural mediation,⁶ and mediation ethics.⁷ However, mediation literature tends to focus on the power aspects of the relationship between the parties, and the discussion of mediators' power and power aspects of the relationship between the mediator and the parties is relatively limited.⁸

The purpose of this article is to provide tools for analyzing the power relations between mediators and the participants in mediation: the parties, their lawyers, co-mediators, and other participants. This article focuses on the power of mediators and their power relations with the parties, and also provides tools for extending the analysis to other participants. This inquiry can contribute to mediation practice and research in several ways:

(1) *Suggesting clear and coherent terminology.* Exploring the meaning of power in mediation assists in developing unambiguous and consistent definitions of "power" and "influence" for the use of mediators and writers in the field, and thus contributes to the clarity of discussion and to the research of the phenomenon of power and its use in mediation.

⁴ See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Richard Delgado et al., *and Fairness Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

⁵ See, e.g., BUSH & FOLGER, *supra* note 1; Allan E. Barsky, *Mediation and Empowerment in Child Protection Cases*, 14 MEDIATION Q. 111 (1996).

⁶ See, e.g., Morgan Brigg, *Mediation, Power, and Cultural Difference*, 20 CONFLICT RESOL. Q. 287 (2003).

⁷ See, e.g., Robert P. Schuwerk, *Reflections on Ethics and Mediation*, 38 S. TEX. L. REV. 757 (1997); Omer Shapira, *Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics*, 8 PEPP. DISP. RESOL. L.J. 243 (2008).

⁸ Mediators' power is discussed to some degree in the context of international mediation, mainly in relation to mediation techniques and their effectiveness. See, e.g., I. William Zartman & Saadia Touval, *International Mediation in the Post-Cold War Era*, in MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT 445, 455–56 (Chester A. Crocker et al., eds., 1996). See also KOVACH, *supra* note 1, at 255–58 (discussing persuasion techniques used by mediators to help parties reach an agreement); MOORE, *supra* note 1, at 379–89 (describing what he calls the mediator's "means of influence"); Saadia Touval & I. William Zartman, *Introduction: Mediation in Theory*, in INTERNATIONAL MEDIATION IN THEORY AND PRACTICE 7 (Saadia Touval & I. William Zartman eds., 1985); Omer Shapira, *The Paradox of Power in Mediation: Power and Weakness in the Relations Between the Mediator and the Parties to Mediation*, 6 KIRYAT HAMISHPAT 371, 371–72, 379–82 (2006) (Isr.) (arguing that there is a gap between the way mediators' power is depicted in mediation literature and the reality of mediation practice).

EXPLORING THE CONCEPT OF POWER IN MEDIATION

(2) *Raising awareness.* Analyzing power in mediation raises the awareness of mediators, parties, and parties' lawyers regarding the power of mediators and the influence tactics that mediators employ. This awareness contributes to:

- (a) a more effective use of power and potential power by mediators;
- (b) an improvement in mediators' training programs;
- (c) a better understanding of the ways in which mediators work;
- (d) an enhanced internal monitoring of mediators' use of power by parties and their lawyers; and
- (e) mediators' self-monitoring of their use of power.

(3) *Supporting ethical behavior.* Acknowledging the element of power in mediation and in mediators' actions enhances the importance of ethical rules in mediation and the adherence of mediators to those rules. The descriptive analysis of mediators' sources of power could serve as a platform for a normative analysis of the ethical implications of the use of power by mediators.⁹

Part II explains why the theory of power and influence is suitable for mediation. Part III describes the potential power resources of mediators and illustrates influence techniques based on those power resources. Part IV discusses the complexity of the phenomenon of power, and Part V examines the parties' sources of power. Part VI discusses the potential contribution of this article to mediators, parties, other participants in mediation, and researchers in the field.

II. THEORIES OF POWER AND INFLUENCE

Power is a vague concept with various meanings. It is a contextual concept used in many fields with different meanings. We talk about political power, military power, economic power, physical power, legal power, psychological power, and social power. Accordingly, one can find theories of power from a number of academic disciplines which overlap to some degree: political power theories,¹⁰ sociological power theories,¹¹ economic power

⁹ See, e.g., OMER SHAPIRA, *USE OF POWER AND INFLUENCE IN MEDIATION: PRACTICE AND APPLIED ETHICS* 341–58 (2007) (Isr.).

¹⁰ See, e.g., PETER BACHRACH & MORTON S. BARATZ, *POWER AND POVERTY: THEORY AND PRACTICE* (1970); ROBERT A. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961); C. WRIGHT MILLS, *THE POWER ELITE* (1956).

¹¹ See, e.g., HUBERT DREYFUS & PAUL RABINOW, *MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS* (2d ed. 1983); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995); MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (A.M. Henderson &

theories,¹² and psychological power theories¹³ to name a few. Mediation is used in a variety of areas: in conflicts between individuals, groups, and states, and in conflicts between individuals and groups.¹⁴ Mediation's body of knowledge draws on the more established disciplines of, among others, psychology, sociology, management, political science, and law.¹⁵ It is only natural, therefore, that mediation concepts, principles, and practice would be informed by other disciplines, and the concept of power in mediation is no exception.

Notwithstanding the above, the field of social psychology seems to be of special relevance for the study of power relations in mediation. In essence, mediation is a forum for multi-party communication whereby each participant tries to influence another participant. Each party tries to make the other party accept its position. Each party tries to convince the mediator that its position is right. The mediator tries to influence the parties to behave in a way which would advance their common interests. In other words, at the heart of the mediators' role is communication and interaction with the parties, and much can be learned in this regard from social power and influence theories. This is clearly the case in mediation between individuals (as in divorce mediation or community mediation between neighbors) but is also true in mediation between individuals and organizations, as these are made up of individuals and are represented in mediation by individuals.

Social psychology literature offers extensive research on the essence of power, its sources, the motivation for using it, and the methods for its use. John R. P. French and Bertram H. Raven, two of the most important researchers in this field, defined "power" as the potential ability to influence another person,¹⁶ and "influence" as the use of force on another person in

Talcott Parsons trans., 1947); Isidor Wallimann et al., *On Max Weber's Definition of Power*, 13 J. SOC. 231 (1977).

¹² See, e.g., KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* (Frederick Engels ed., Samuel Moore & Edward Aveling trans., 1967).

¹³ See *infra* notes 16–26.

¹⁴ See, e.g., FOLBERG & TAYLOR, *supra* note 1, at chs.6–8; KOVACH, *supra* note 1, at ch.16.

¹⁵ Textbooks on mediation tend to reflect this diversity. See, e.g., FOLBERG & TAYLOR, *supra* note 1 (putting an emphasis on sociological and psychological aspects of mediation practice); KOVACH, *supra* note 1 (dedicating much space to the legal aspects of mediation); MOORE, *supra* note 1, at xiii (integrating practical experience with research, noting that "[t]his book is suitable for use in law, business, social work, counseling, management, education, sociology, and psychology seminars. Undergraduates as well as graduates will find it useful in learning mediation concepts and skills.").

¹⁶ See John R.P. French, Jr. & Bertram Raven, *The Bases of Social Power*, in *STUDIES IN SOCIAL POWER* 150, 152 (Dorwin Cartwright ed., 1959).

EXPLORING THE CONCEPT OF POWER IN MEDIATION

order to bring about a change in the person's behavior, opinions, goals, needs, or values.¹⁷ They defined five bases of power: coercion, reward, legitimacy, referent, and expertise,¹⁸ and later a sixth base of power, information, was added to the list.¹⁹ The bases of power were reconsidered in a later publication which presented them within a power/interaction model of interpersonal influence²⁰ and added to the sources of power two methods of influence: environmental or ecological manipulation, and invoking the power of third parties.²¹

Certainly this list of sources of power is not exhaustive²² and other writers have suggested different classifications for the bases of social power.²³ Nevertheless, the French & Raven typology has been widely

¹⁷ See *id.* at 151–52. On the distinction between power and influence, see Meni Koslowsky & Joseph Schwarzwald, *The Power Interaction Model: Theory, Methodology, and Empirical Applications*, in *THE USE AND ABUSE OF POWER: MULTIPLE PERSPECTIVES ON THE CAUSES OF CORRUPTION* 195, 196 (Annette Y. Lee-Chai & John A. Bargh eds., 2001) (“Social power and influence have frequently been used interchangeably, yet the two terms describe distinct phenomena. The former refers to the potential sources available to an individual for influencing another person to comply and do what he or she would not have done otherwise. In contrast, the latter describes the specific tactics explicitly exercised by the influencing agent in attempting to gain compliance.”). See also Peter T. Coleman, *Power and Conflict*, in *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* 108, 113 (Morton Deutsch & Peter T. Coleman eds., 2000) (“[P]ower can be usefully conceptualized as a mutual interaction between the characteristics of a person and the characteristics of a situation, where the person has access to valued resources and uses them to achieve personal, relational, or environmental goals, often through using various strategies of influence.”).

¹⁸ See French & Raven, *supra* note 16, at 155–64.

¹⁹ See Bertram H. Raven, *Social Influence and Power*, in *CURRENT STUDIES IN SOCIAL PSYCHOLOGY* 371, 372 (Ivan D. Steiner & Martin Fishbein eds., 1965).

²⁰ See Bertram H. Raven, *A Power/Interaction Model of Interpersonal Influence: French and Raven Thirty Years Later*, 7 J. SOC. BEHAV. & PERSONALITY 217 (1992) [hereinafter Raven, *French and Raven Thirty Years Later*]. See also Bertram H. Raven, *Power/Interaction and Interpersonal Influence: Experimental Investigations and Case Studies*, in *THE USE AND ABUSE OF POWER: MULTIPLE PERSPECTIVES ON THE CAUSES OF CORRUPTION*, *supra* note 17, at 217.

²¹ See Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 222–23.

²² See *id.* at 222.

²³ See, e.g., Coleman, *supra* note 17, at 109–13; Koslowsky & Schwarzwald, *supra* note 17, at 199 (referring to control, credibility, attractiveness, and normative); ROY J. LEWICKI ET AL., *NEGOTIATION* 193 (4th ed. 2003) (focusing on three sources of power: information and expertise, control over resources, and position power); Desmond Ellis & Laurie Wight, *Theorizing Power in Divorce Negotiations: Implications for Practice*, 15 MEDIATION Q. 227, 230 (1998) (giving examples for sources of power such as education, status, money, intelligence, legal and social norms, control over communication, and

accepted by the research community and applied in various areas.²⁴ It is especially applicable to mediation as mediation is a complex process of interaction between the participants—the parties, the mediator and the parties' representatives.²⁵ Another approach to social power can be found in research which has focused on the classification of influence tactics. These theories have studied the different types of influence tactics, the way agents of influence choose between them, and their effectiveness.²⁶ In addition, one can find in the literature research that specifically focuses on mediators' strategies, tactics, and techniques, and which can throw light on mediators' bases of power and influence tactics.²⁷ Part III combines these sources of

experience in negotiation); Hughes, *supra* note 3, at 574–75 (dividing power into five areas: economic, intellectual, physical, emotional, and procedural).

²⁴ See, e.g., Koslowsky & Schwarzwald, *supra* note 17, at 197 (“The French and Raven (1959) typology of social power is thought to be ‘the most comprehensive and insightful theory of social influence in functional terms or more generally’. Indeed, it has been used in a variety of fields for studying interpersonal power and influence. These include familial relations, education, marketing and consumer psychology, and health and medicine.”) (citations omitted). See also Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 218, 234–39.

²⁵ See Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 239–40 (noting that “[the] model was developed as a guide for research, and for an analysis of on-going interactive situations. As such, it may also be useful for those who are in positions of influence, to help them understand more clearly the bases for their own actions, and the possibilities of alternatives.”).

²⁶ See generally David Kipnis et al., *Intraorganizational Influence Tactics: Explorations in Getting One's Way*, 65 J. APPLIED PSYCHOL. 440 (1980); Chester A. Schriesheim & Timothy R. Hinkin, *Influence Tactics Used by Subordinates: A Theoretical and Empirical Analysis and Refinement of the Kipnis, Schmidt, and Wilkinson Subscales*, 75 J. APPLIED PSYCHOL. 246 (1990). See also DAVID KIPNIS, *THE POWERHOLDERS* (1976); David Kipnis & Stuart Schmidt, *The Language of Persuasion*, 19 PSYCHOL. TODAY 40 (1985); Gary Yukl & J. Bruce Tracey, *Consequences of Influence Tactics Used with Subordinates, Peers, and the Boss*, 77 J. APPLIED PSYCHOL. 525 (1992).

²⁷ See, e.g., MOORE, *supra* note 1, at 383–89; Peter J.D. Carnevale, *Strategic Choice in Mediation*, 2 NEGOT. J. 41 (1986); James K. Esser & Richard G. Marriott, *A Comparison of the Effectiveness of Substantive and Contextual Mediation Tactics*, 25 J. APPLIED SOC. PSYCHOL. 1340 (1995) [hereinafter Esser & Marriott, *A Comparison*]; James K. Esser & Richard G. Marriott, *Mediation Tactics: A Comparison of Field and Laboratory Research*, 25 J. APPLIED SOC. PSYCHOL. 1530 (1995) [hereinafter Esser & Marriott, *Mediation Tactics*]; David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613 (1989); Deborah M. Kolb, *Strategy and the Tactics of Mediation*, 36 HUM. REL. 247 (1983) [hereinafter Kolb, *Strategy and Tactics*]; Deborah M. Kolb, *To Be a Mediator: Expressive Tactics in Mediation*, 41 J. SOC. ISSUES 11 (1985)

EXPLORING THE CONCEPT OF POWER IN MEDIATION

power and influence tactics in order to present a comprehensive picture of mediators' sources of power and those influence tactics which are based on them.²⁸

III. MEDIATORS' SOURCES OF POWER AND INFLUENCE TACTICS

This section aims to identify mediators' sources of power and explain how these bases of power are utilized to influence the participants in mediation. It is descriptive and does not pass judgment on the legitimacy of the use of power by mediators. This would require a normative analysis of mediators' behavior and a discussion of mediation ethics, which are beyond

[hereinafter Kolb, *Expressive Tactics*]; Mary E. McLaughlin et al., *Professional Mediators' Judgments of Mediation Tactics: Multidimensional Scaling and Cluster Analyses*, 76 J. APPLIED PSYCHOL. 465 (1991); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996); Debra Shapiro et al., *Mediator Behavior and the Outcome of Mediation*, 41 J. SOC. ISSUES 101 (1985); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7 (1986); James A. Wall, Jr. & Dale E. Rude, *Judicial Mediation: Techniques, Strategies, and Situational Effects*, 41 J. SOC. ISSUES 47 (1985).

²⁸ The bases of power and the tactics of influence complement each other. See, e.g., Jan Bruins, *Social Power and Influence Tactics: A Theoretical Introduction*, 55 J. SOC. ISSUES 7, 12 (1999) (suggesting that the difference between theories which focus on the bases of power and theories which focus on influence tactics is that the first approach represents a move from theory to facts, i.e. a theory is developed and then tested by empirical research, while the latter approach represents a move from empirical findings on methods of influence to an explanation of these findings by a theory). Each approach has its advantages and disadvantages, and the ideal is to integrate the advantages of both. *Id.* Influence tactics sometimes serve to enhance the bases of power and increase the effectiveness of influence attempts. See, e.g., Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 223–25 (referring to a number of influence tactics which set the stage for an influence attempt, strengthen the bases of power of the power holder, and weaken the influenced person). Raven believed that researchers sometimes confused the bases of power and the tactics which were aimed to set the stage for an effective exercise of power. See *id.* at 225–26. He noted:

It appears that at least some of the inconsistency in the literature regarding the bases of power results from confusing the actual bases of power and the preparatory devices for their use. When the investigator uses open-ended questions or essays to categorize the method of influence used, some respondents will explicitly mention one or more bases of power, some will describe the preparatory devices, leaving the actual bases of power implicit.

Id.

the scope of this article. What follows is a list of potential bases of power which mediators might possess or take steps to develop. Each base of power is described, illustrated, and shown how it is, or could be, invoked by mediators in order to influence the participants in mediation.²⁹ Note that mediators may possess several bases of power simultaneously and employ influence tactics which make use of several power bases.

A. Coercive Power

Coercive power is the ability to cause what the other party would consider a negative outcome.³⁰ This ability derives from control over resources such as money, physical strength, and high social status. The negative outcome may take various forms such as economic damage, physical injury, or pain. When the power holder and the other person have a personal relationship, the base of power may extend to personal coercion, i.e. the relationship could serve as a resource for influence, and the negative outcome might include disapproval or rejection by the power holder.³¹

This definition of coercive power is not the same as the dictionary meaning³² or the legal meaning³³ of coercion, which tend to stress the *consequences* of the *use* of coercive power, i.e. the coerced person's loss of

²⁹ As there are numerous influence tactics, this discussion of them is meant to be illustrative, not exhaustive.

³⁰ See French & Raven, *supra* note 16, at 157–58.

³¹ See Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 219.

³² See, e.g., A.S. HORNBY, OXFORD ADVANCED LEARNER'S DICTIONARY OF CURRENT ENGLISH (1987) (defining “coerce” as to “use force to make sb obedient, etc; compel sb (to a course of action)”); BusinessDictionary.com, Coercive Power, <http://www.businessdictionary.com/definition/coerce-power.html> (last visited Feb 3, 2009) (defining “coercive power” as “[a]uthority or power that is dependent on fear, suppression of free will, and/or use of punishment or threat, for its existence”); Merriam-Webster Online Dictionary, Coerce, <http://www.merriam-webster.com/dictionary/coerce> (last visited Feb 3, 2009) (defining “coerce” as “to restrain or dominate by force . . . to compel to an act or choice . . . to achieve by force or threat”).

³³ See, e.g., Timothy Hedeon, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary Than Others*, 26 JUST. SYS. J. 273, 275 (2005) (“Coercion is sometimes defined as *constrained volition*, wherein the recipient still retains the ability to make a choice but is given a limited set of unwanted options.”) (citation omitted); *Id.* at 275–76 (“[Coercion’s] legal definition is tied closely to ‘duress,’ meaning ‘threat of harm made to compel a person to do something against his or her will or judgment; esp. a wrongful threat made by one person to compel a manifestation of seeming assent by another person to a transaction without real volition’”) (quoting BLACK’S LAW DICTIONARY 520–21 (7th ed. 1999)).

EXPLORING THE CONCEPT OF POWER IN MEDIATION

free will or choice. "Coercive power," for the purpose of identifying a source of power, focuses on the *potential ability* of the power holder to cause a negative outcome (such as a limited range of choices) from the perspective of the influenced person, whether such outcome materializes or not. It is possible, for example, that the exercise of coercive power (the influence attempt) failed because the target of that use of power successfully resisted the attempt of influence; however, this would not affect the correctness of the factual assertion that the power holder possessed or invoked coercive power.

It is clear that judges have coercive power. They can compel litigants to give testimony; they can also impose a decision that brings an end to litigation. It is less obvious how mediators could have coercive power. The above analysis shows that mediators may have coercive power because the issue is whether the mediator could potentially cause harm to the parties, not whether the mediator actually does so. This could be the case, for example, where the court is allowed to receive information or recommendations from the mediator, which could then serve as a basis for the court's decision,³⁴ or where the mediator threatens to end mediation and cause the parties to return to court, when one or all of the parties prefers to avoid such an outcome.³⁵ In these situations, the mediator's coercive power is used, or could be used, to put pressure on the parties to influence their behavior. The mediator's threat to take an action need not be express; it may be implicit.³⁶

Coercive power in mediation is used in its most blatant mode in international mediation, where mediators' pressure and "arm twisting" are often tolerated.³⁷ In other areas of mediation, the exercise of coercive power

³⁴ See e.g., CAL. FAM. CODE § 3183(a) (West 2004) ("[T]he mediator may . . . submit a recommendation to the court as to the custody of or visitation with the child."); § 3183(c) ("In appropriate cases, the mediator may recommend that restraining orders be issued, pending determination of the controversy, to protect the well-being of the child involved in the controversy.").

³⁵ See MOORE, *supra* note 1, at 386–87. For a discussion on mediator coercion, see also Hedeem, *supra* note 33, at 279–84; KOVACH, *supra* note 1, at 375–84.

³⁶ Note again that this article deals with the factual or descriptive aspect of mediators' power and does not evaluate the normative implications of the use of that power, i.e. whether the exercise of that power would be ethical.

³⁷ See SAADIA TOUVAL, *THE PEACE BROKERS: MEDIATORS IN THE ARAB-ISRAELI CONFLICT, 1948–1979* (1982) (describing a number of incidents in which the United States imposed pressure on Israel during mediation attempts between Israel and the Arab world); see also Roger Fisher, *Playing the Wrong Game?*, in *DYNAMICS OF THIRD PARTY INTERVENTION: KISSINGER IN THE MIDDLE EAST* 95, 101 (Jeffrey Z. Rubin ed., 1981) (describing the use of coercive power by the then-American Secretary of State Henry Kissinger in the negotiations between Israel and Egypt after the Yom-Kippur (October) War in the 1970s).

tends to be more subtle and based on personal coercion.³⁸ The scale of that power could expand depending on the ability of the mediator to construct a close relationship with the parties. The closer the relationship, the wider the coercive base of power, with the mediator's opinions and suggestions carrying more weight in the decisionmaking of the parties who wish to preserve that personal relationship and avoid the risk of losing the mediator's appreciation. An example of influence based on personal coercive power is where the mediator and a party have created a personal relationship, and the mediator then expresses disagreement with the party's opinion or disappointment with the party's attitude. Such behavior would probably be ineffective between strangers, but may cause emotional pain to someone close, and thus motivate behavior in line with the mediator's will.

A related influence tactic is blocking, which aims to prevent the influenced person from taking an action.³⁹ Blocking utilizes personal coercive power to exert influence, and could include a threat to stop cooperation with someone or negatively change the way a person is treated. Mediators might use this tactic by threatening to bring the mediation to an end (i.e. stop cooperating with the parties) to prevent one party from interrupting the other party or using abusive language.

B. Reward Power

Reward power is the ability to bring about what the other party would consider a positive outcome.⁴⁰ This ability, as in the case of coercive power, derives from control over resources. Again, a personal relationship with the influenced person might enhance this base of power, making it personal reward power.⁴¹ The exercise of reward power could be regarded as influence by compensation. Mediators use this tactic to motivate parties to make concessions they would not have made had they not received compensation from the mediator.⁴²

The use of reward power is common in international mediation.⁴³ Mediators offer parties economic aid and political guarantees in order to

³⁸ But see *supra* note 35; Shapira, *supra* note 7, at 260–61 (discussing the use of coercion and pressure by mediators).

³⁹ See Kipnis et al., *supra* note 26, at 446–47.

⁴⁰ See Bruins, *supra* note 28, at 9.

⁴¹ See Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 219–20.

⁴² See Carnevale, *supra* note 27, at 45. See also Esser & Marriott, *Mediation Tactics*, *supra* note 27, at 1539 (discussing the effectiveness of the compensation tactic).

⁴³ See Esser & Marriott, *Mediation Tactics*, *supra* note 27, at 1539.

EXPLORING THE CONCEPT OF POWER IN MEDIATION

make them accept proposals or agree to make concessions.⁴⁴ In other areas of mediation, mediators tend to limit themselves to psychological compensation. For example, mediators could compliment parties for their negotiation skills in order to boost their self-esteem and make them more receptive to a proposed solution. They could also praise a party in front of those who sent the party to negotiate on their behalf for the rigorous defense of their interests. Doing so could strengthen the party's position in the negotiation, thus enabling the party to make concessions, and possibly influence the principals to accept the outcome which the party negotiated.⁴⁵

C. Expert Power

Expert power is based on a perception of the power holder as having superior knowledge and experience.⁴⁶ One tends to follow what experts advise because one assumes that the expert knows better what should be done.⁴⁷ An explanation for the force of expert power is that people tend to adopt automatic behavior patterns and make "mental shortcuts" which help them to effectively handle the load of information and the complexity of the environment in which they live. As a result, people tend to act according to heuristics, or rules of thumb, which help them make decisions quickly without investing much thought into the matter, with the risk of sometimes making mistakes.⁴⁸ In the case of expert power there is a tendency to make a mental shortcut: "if the expert said so, then it is probably correct." This means that statements made and directions given by people who are perceived as experts in the relevant field are more likely to be accepted without a careful examination of reasons and arguments.⁴⁹

⁴⁴ See BOULLE & NESIC, *supra* note 1, at 117; Peter J.D. Carnevale & Rebecca A. Henry, *Determinants of Mediator Behavior: A Test of the Strategic Choice Model*, 19 J. APPLIED SOC. PSYCHOL. 481, 482 (1989) (The United States mediated a dispute between Italy and what was then Yugoslavia on the control of areas in the north Adriatic Sea and offered Yugoslavia economic aid for the development of a new port to replace Trieste.).

⁴⁵ See, e.g., Carnevale, *supra* note 27, at 46-47.

⁴⁶ See French & Raven, *supra* note 16, at 163.

⁴⁷ This is the positive aspect of expert power ("positive expert power"). The negative aspect occurs where one rejects the expert's advice due to suspicions of the expert's motives ("negative expert power"). See Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 221.

⁴⁸ See ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 6-7 (3rd ed. 1993).

⁴⁹ See *id.* at 8, 187. See also ERWIN P. BETTINGHAUS & MICHAEL J. CODY, *PERSUASIVE COMMUNICATION* 71-72, 125-33 (5th ed. 1994).

Expert power is an important base of power for mediators. In fact, two types of expertise might be relied upon by mediators: expertise in conflict resolution and expertise in the subject matter of the dispute. Mediators often present themselves as experts in conflict resolution, i.e. as having experience in the field of dispute resolution and special training and skills which are necessary to perform the role of mediator. Mediators who are professionals in other fields, such as lawyers, psychologists, and accountants, might possess an extended expert power base. For example, a lawyer-mediator who specializes in labor law might enjoy enhanced expert power when mediating an employee-employer dispute where the discussion concentrates on the legal rights of the employee to payment and social benefits. A psychologist-mediator might have extended expert power when mediating a divorce dispute where the discussion focuses on visiting arrangements and responsibilities as to children care. In such cases, the perception of the mediator as an expert gives the mediator more leverage, and the parties are more likely to listen to the mediator.

Expertise is continually constructed and maintained during mediation. This is done through both direct and indirect messages of expertise which mediators send to the participants. For example, at the opening session, mediators might dress formally with a suit and tie, arrange seating so they sit at the head of the table, and stress their vast experience and expertise.⁵⁰ Mediators continue to build up a message of expertise as the mediation process proceeds. They do so by asking questions which enable them to show their experience and understanding of the field, and which give the parties the feeling that the facts they have provided are important for the design of the mediation's outcome.⁵¹ The expertise message is especially clear when mediators give advice on options or factual issues, or when they use legal or professional terminology.⁵²

A typical example of mediators' use of subject matter expertise is evaluation.⁵³ Evaluation is a tactic employed by mediators in order to make

⁵⁰ See Kolb, *Expressive Tactics*, *supra* note 27, at 15. Note the overlap with position power (formal legitimacy). See *infra* Part III(E)(1).

⁵¹ *Id.* at 16-17.

⁵² See Silbey & Merry, *supra* note 27, at 12. See also Michel Foucault, *The Subject and Power*, in MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS, *supra* note 11, at 208, 208-26 (2nd ed. 1983) (treating expertise, professional knowledge, and belonging to a profession as sources of power).

⁵³ See, e.g., Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998) (criticizing evaluation in mediation); Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669 (1997) (focusing on the ethical aspects of evaluation in

EXPLORING THE CONCEPT OF POWER IN MEDIATION

the parties see the strengths and weaknesses of their positions, and take into consideration a realistic expected outcome in court litigation.⁵⁴ Mediators who evaluate usually emphasize their education, qualifications, experience, and expertise.⁵⁵ They then present the parties, usually in separate meetings, with their own evaluation of the likely outcome in court and suggest options for settlement in varying degrees of directiveness.⁵⁶ It is not uncommon for evaluative mediators to push the parties to compromise or to accept a particular outcome.⁵⁷ Mediators who use this tactic typically rely on their expertise in the subject matter of the dispute. A lawyer-mediator might refer to the legal aspects of the parties' case, their prospects of failure or success in litigation, and the legal and financial implications of refusing to settle in mediation.⁵⁸ A mediator who belongs to the psychology profession might evaluate the emotional implications of the parties' positions on their children.⁵⁹

An example of mediators' use of expertise power in conflict resolution would be the practice of identifying the parties' interests and changing their perception of the conflict. Mediators help the parties to recognize and understand their interests and the interests of the other party. Interests are the needs of the parties and the reasons behind their demands, and mediators assist the parties in distinguishing between their demands and positions on the one hand and their interests and needs on the other hand.⁶⁰ During mediation, mediators can help parties to identify interests, to which each party assigns different weight, and encourage them to trade in those

mediation); Riskin, *supra* note 27, at 23–24 (discussing the evaluative model of mediation); see also BOULLE & NESIC, *supra* note 1, at 28–29, 134, 157, 171–72; MOORE, *supra* note 1, at 304–06.

⁵⁴ See, e.g., Riskin, *supra* note 27, at 26–27.

⁵⁵ See *id.* at 26, 31.

⁵⁶ See *id.* at 25–35 (illustrating weak and strong directiveness styles).

⁵⁷ See *id.* at 26, 31.

⁵⁸ See, e.g., James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This The End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66 (1991) (quoting a lawyer describing the use of such tactics by mediators: "The mediator will tell you how bad your case is . . . try to point out the shortcomings of the case to the parties and try to get the plaintiff to be realistic. They point out that juries aren't coming back with a lot of money anymore on these types of cases. They ask you tough questions to get you to see where you might have a liability problem or the doctor says you don't have a permanent injury so you may get nothing.") (ellipsis in original).

⁵⁹ In applying the evaluation tactic, mediators also use informational power. See *infra* Part III(F).

⁶⁰ On the distinction between positions and interests, see, e.g., ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 40–55 (2d ed. 1991).

interests.⁶¹ In addition, mediators try to offer a new perspective on the dispute which would enable the parties to perceive the conflict differently, and develop creative solutions which the parties were not aware of, and were unlikely to reach had the mediator not intervened in that fashion.⁶² This kind of intervention technique is primarily based on the expert power of mediators as professionals in conflict management and effective negotiation, and on information power as discussed later in this article.

D. Referent Power

One has referent power where another (the influenced person) identifies with the power holder or finds common points of likeness with the power holder.⁶³ Positive referent power motivates one to follow what one is told by someone whom one identifies with or finds charismatic.⁶⁴

Mediators construct referent power by presenting an image and personal values which the parties find attractive. For example, mediators might describe themselves as family-oriented individuals, sports enthusiasts, and successful businesspersons.⁶⁵ Mediators could also take steps to create an atmosphere of closeness between the parties and themselves. For example, mediators might ask the parties to address them by their first names, call the parties by their first name, engage in small talk, make jokes, and express empathy to the parties.⁶⁶ Some writers describe these actions as influence by ingratiation.⁶⁷ By using influence tactics based on referent power, mediators make use of the parties' feelings of closeness, similarity, and identification as leverage for making the parties more cooperative and less resistant to influence attempts.⁶⁸

⁶¹ See Esser & Marriott, *A Comparison*, *supra* note 27, at 1341; McLaughlin et al., *supra* note 27, at 467.

⁶² See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754, 799 (1984) (illustrating the advantages of creative problem-solving negotiation).

⁶³ See French & Raven, *supra* note 16, at 161–62.

⁶⁴ See Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 221. Conversely, we tend to reject advice given by someone we find repulsive.

⁶⁵ Compare CIALDINI, *supra* note 48, at 142–43.

⁶⁶ See Kolb, *Expressive Tactics*, *supra* note 27, at 19.

⁶⁷ See BETTINGHAUS & CODY, *supra* note 49, at 297–99; CIALDINI, *supra* note 48, at 136–56; Kipnis et al., *supra* note 26, at 445, 447.

⁶⁸ See Kolb, *Expressive Tactics*, *supra* note 27, at 19.

E. *Legitimate Power*

Legitimate power exists where a person believes that the power holder has a right to ask something of the person, and that the person has an obligation to do as the power holder has asked. There are several types of legitimate power, discussed below.⁶⁹

1. *Position Power*

Position power (or formal legitimacy) derives from a position or a role which makes it legitimate to ask someone for something or to order someone to perform a task.⁷⁰ This legitimacy may be expressly defined in a legal setting (as in the role of a judge and the judge's powers), but can also be implied from other social norms (as in a group which associates authority with old age).⁷¹

Mediators who are perceived by parties as managers of the process and as having the authority to make decisions relating to procedure enjoy position power. Mediators enhance their position power by accentuating their hierarchical position as managers of the process. They emphasize their authority by making decisions as to sitting arrangements and rules of discussion (e.g. which party talks first, when a party may respond, and how long a party may talk), by setting the agenda, and by deciding on separate meetings.⁷² The use of position power characterizes dominant and authoritative mediators who take an active role in managing the process and in designing the mediation outcome,⁷³ but it can also be more sophisticated and less apparent.⁷⁴ It seems that assertiveness is closely associated with the

⁶⁹ See Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 220–21.

⁷⁰ See *id.* at 220.

⁷¹ See CIALDINI, *supra* note 48, at 173–77 (referring to this power as authority pressure).

⁷² See also *infra* Part III(G) (discussing environmental manipulation power).

⁷³ Mediators also manage the process and influence the outcome of mediation by relying on other bases of power, especially on expert power, i.e. their professional skills required for the management of conflict and their superior understanding of the professional aspects of the dispute (for example, the legal rights of the parties).

⁷⁴ See, e.g., Greatbatch & Dingwall, *supra* note 27 (discussing the technique of selective facilitation, which has been used by mediators to navigate the mediation to issues and options which correspond to the mediators' favored outcome). Position power might also be attributed to a person, sometimes unconsciously, through deeply held cultural norms. Thus, for example, a man might be placed at a higher power position than a woman according to a patriarchal social norm which makes gender an aspect of power.

use of position power by power holders.⁷⁵ Though assertiveness can be seen as an independent aspect of mediators' behavior in the execution of all influence tactics,⁷⁶ it is clearly employed by mediators in the exercise of position power, as illustrated by the above examples. Mediators who are former judges enjoy an enhanced power position due to a combination of their high social status (i.e. position power) and their special knowledge and skills (i.e. expert power).⁷⁷ Mediators in court-connected mediations strengthen their position power through their linkage with the court and its aura of authority.⁷⁸ Similarly, mediators working for large organizations might enjoy an increased position power through a power spillover from the organization.⁷⁹

2. Power of Reciprocity

The power of reciprocity (or legitimacy of reciprocity) is based on the social norm of "give and take": where one has done something for the benefit of another, the latter should feel obliged to repay the former and do something in return.⁸⁰ The power of reciprocity is the basis for the influence

See also Delgado et al., *supra* note 4, at 1375, 1402–03 (discussing the possibility that persons of low social status could be disadvantaged in mediation).

⁷⁵ *See* Kipnis et al., *supra* note 26, at 445, 447 (describing assertiveness as including "demanding, ordering, and setting deadlines").

⁷⁶ *See* Kenneth Kressel & Dean G. Pruitt, *Themes in the Mediation of Social Conflict*, 41 J. SOC. ISSUES 179, 193 (1985).

⁷⁷ *See* Alfini, *supra* note 58, at 69 (referring to the power of retired judges and noting that "[o]ne of the retired judges explained that he emphasizes his judicial background during his opening statement to get them in the right frame of mind: 'I introduce myself and give them my background because I think that's very helpful to litigants to know they're before a retired judge with a lot of experience. . . . I tell them that even a poor settlement, in my judgment, is preferable to a long and possibly expensive trial together with all the uncertainties that attend a trial'" (footnote omitted)).

⁷⁸ *See infra* Part III(H) (discussing third parties' power). Mediators could, of course, play down their position power by sending the parties a message of equality, by empowering the parties, by emphasizing the importance of parties' active participation and responsibility for decisionmaking throughout mediation (as opposed to outcome alone), and by distancing themselves from court (conducting the process informally and assisting communication and constructive discussion rather than determining facts).

⁷⁹ *See, e.g.,* Jeffrey Z. Rubin, *Introduction*, in DYNAMICS OF THIRD PARTY INTERVENTION: KISSINGER IN THE MIDDLE EAST, *supra* note 37, at 3, 9 (noting that a federal mediator intervening in an employment dispute is perceived as a representative of the United States government).

⁸⁰ *See* Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 220; *see also* Michael Watkins, *Principles of Persuasion*, 17 NEGOT. J. 115, 126 (2001).

EXPLORING THE CONCEPT OF POWER IN MEDIATION

tactic of exchange of benefits. This tactic includes a suggestion to behave in a certain way in exchange for a certain action, a concession, or some help.⁸¹

Mediators use the power of reciprocity in various ways, attempting to trigger responses either towards themselves or towards one of the parties. For example, the mediator might suggest that a party do something (e.g. show more flexibility in the negotiation) in exchange for an action by the mediator (e.g. persuade the other party to stay in mediation or make an offer). Another example would be where the mediator brings to the attention of one party concessions made by the other party, utilizing the reciprocity norm to justify an expectation for a concession to be made by that party as well.

3. Power of Equity

The power of equity (or legitimacy of equity) is based on a norm of fairness which creates a right to compensation.⁸² One establishes this power base where one portrays oneself as someone who has worked hard or suffered, and as a result has the right to be compensated.

Mediators might use the power of equity in order to make a party feel obligated to act. The obligation may be owed to the mediator or to the other party. For example, mediators might emphasize the time and effort they have invested in the process in order to assist the parties, and by doing so make the parties feel obligated to cooperate in the negotiation and help the mediator conduct an effective negotiation. Mediators who cause a party to consider whether it has caused mischief or pain to the other party employ the power of equity in an attempt to make the party feel obligated to compensate the other party.

Sophisticated negotiators sometimes ask the other side to do something which it is likely to refuse, in order to set the stage for another request which is more likely to be accepted due to a sense of guilt from the refusal.⁸³ Mediators who wish to employ this influence tactic in mediation might ask parties to make a large concession which the parties would probably reject, when in fact the request has been intended to set the stage for a subsequent and more modest request, which is more likely to be accepted.

⁸¹ See Kipnis et al., *supra* note 26, at 446–47. See also Yukl & Tracey, *supra* note 26, at 526.

⁸² See Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 220–21.

⁸³ See, e.g., CIALDINI, *supra* note 48, at 12–13, 35–36 (discussing the “door in the face” technique and the “perceptual contrast” principle).

4. Power of Weakness

The power of weakness is based on a norm which creates an obligation and responsibility to assist those who cannot help themselves or who are dependant on others.⁸⁴

Mediators invoke this power by presenting themselves as weak in order to motivate the parties to act and assist the mediator, or by presenting one of the parties as weak in order to encourage the other party to address that weakness. For example, mediators sometimes employ a tactic of inaction, making the parties realize that the key for success is in their hands and that the mediator cannot solve their problems alone.⁸⁵ This intervention, or lack of action, might encourage the parties to take positive steps to further the negotiation.⁸⁶ Mediators employing the power of weakness might also stress the dependence of one party on the other party and thus draw attention to the responsibility of the strong party to help the weak party. For example, in divorce mediation, the mediator might emphasize the financial hardship of the wife who has to pay for both her expenses and the expenses of the children, thus paradoxically enhancing the wife's bargaining power in the negotiation with her husband.⁸⁷

⁸⁴ Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 221 (identifying weakness (powerlessness) power with legitimacy of dependence). It is, however, possible to possess weakness power in situations where no obligation or feeling of obligation arises. For example, one could benefit from causing the other party to believe that one's "hands are tied" by external constraints which are beyond one's control, thus making futile the other party's demands for concessions. Likewise, if a company's representative negotiates a settlement and presents a legal power on behalf of the company's board which expressly indicates the limits on the representative's authority to settle, it would be pointless to expect the representative to settle outside the limits of authority, thus translating this weakness (in terms of decisionmaking power) into a position of power (in terms of the representative's immunity from pressure to settle or make further concessions). See, e.g., THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 29 (1960).

⁸⁵ See Carnevale, *supra* note 27, at 47.

⁸⁶ See *id.*, at 47; see also Christine B. Harrington, *Howard Bellman: Using "Bundles of Input" to Negotiate an Environmental Dispute*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS* 105, 127 (Deborah M. Kolb ed., 1994) (quoting mediator Bellman's description of his mediation style: "[O]ne of the things you will see happen is that people eventually come to the conclusion that I am not doing anything. . . . So if I don't come to the meetings, it does not matter. . . . [the parties] see me over at the end of the room staring into space, and they think, 'Jesus, that is not bad work.' . . . They feel a lot of pressure, and they see me picking up a check. . . . [this perception is] some indication . . . that I did it right . . .").

⁸⁷ Imbalance of power between mediation parties raises issues of fairness, neutrality, and the proper role of mediators in such circumstances. See, e.g., BOULLE & NESIC, *supra*

F. *Informational Power*

Information is power, but not every piece of information generates power, since it must be of relevance to the influenced person. Mediators possess and have access to information which is valuable for the parties and crucial for the success of mediation. This information helps mediators do their work and influence the parties, mainly by persuasion. One employs an influence tactic based on informational power when one presents another person with facts or logical arguments with a view to change that person's behavior or attitude.⁸⁸ Persuasion attempts may be direct and obvious, or indirect and subtle.⁸⁹ The line between persuasion and manipulation is not always clear. Generally, manipulation refers to the use of information in a covert manner, with an appeal to emotions and fears rather than to reason and logic.⁹⁰

Mediators rely extensively on informational power. First, mediators work in various ways to bring to the parties' attention information which may be relevant for the dialogue between them. For example, mediators encourage parties to tell their stories and assist parties by asking questions⁹¹; they

note 1, at 71–72, 455–56; GOLDBERG ET AL., *supra* note 1, at 160; MOORE, *supra* note 1, at 391–93; JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 270 (1989); Eileen Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 DENV. U. L. REV. 931, 931–33, 937 (1997); John D. Feerick, *Toward Uniform Standards of Conduct For Mediators*, 38 S. TEX. L. REV. 455, 463 (1997).

⁸⁸ See also Kipnis et al., *supra* note 26, Yukl & Tracey, *supra* note 26, at 526 (referring to tactics used by people at work and identifying an influence tactic based on information, defined as an appeal to rationality, which includes the presentation of information supporting one's position, the explanation of the reasons for a request, and the use of logical arguments for the purpose of persuasion).

⁸⁹ See, e.g., Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 222 (illustrating direct and indirect persuasion). A nurse could affect a doctor's decision on treatment either directly by telling the doctor what she believes should be done, or indirectly by mentioning incidentally that in the past certain treatment was helpful in similar circumstances. *Id.*

⁹⁰ On the distinction between persuasion and manipulation see, e.g., RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 349–55 (1986); Stanley I. Benn, *Freedom and Persuasion*, 45 AUSTRALASIAN J. PHIL. 259 (1967), reprinted in SELF-DETERMINATION IN SOCIAL WORK: A COLLECTION OF ESSAYS ON SELF-DETERMINATION AND RELATED CONCEPTS BY PHILOSOPHERS AND SOCIAL WORK THEORISTS 224, 230–31 (F.E. McDermott ed., 1975).

⁹¹ Asking questions is an indirect persuasion technique which reduces resistance to influence attempts and makes the parties deal with the situation and think of what they want to do about it. See, e.g., Deborah M. Kolb, *William Hobgood: "Conditioning"*

involve the parties' lawyers in the discussion⁹²; and they might refer the parties to an external expert for advice⁹³ or suggest they search for information by their own. Mediators sometimes present information to the parties directly and try to persuade them to take a certain action, to accept a proposal, or to see the situation or the other party's conduct in a different light. Mediators attempt to give their arguments more force by supplying information on previous cases which they have handled, bringing examples for proposals accepted in the past,⁹⁴ and suggesting external or objective criteria for decisionmaking.⁹⁵

Second, mediators sometimes modify information they pass over to the parties in order to make it more attractive and acceptable.⁹⁶ If, for example, one party is willing to pay a certain sum of money to settle, and it is clear to the mediator that the other party would reject the proposal and see it as an insult, the mediator might choose to report the positive attitude of the party (i.e., his willingness to settle and to pay money towards a solution of the dispute), without mentioning the details of the proposal. It is possible that

Parties in Labor Grievances, in *WHEN TALK WORKS*, *supra* note 86, at 149, 176. Mediator Hobgood explains this technique:

I think some mediators have a tendency to tell people what they ought to do . . . What's right or wrong. The problem is that people have a natural tendency to resist this kind of thing. When you use questions, they have to answer. They have to tell themselves what they want to do, to reach their own conclusions. Sometimes questions are guided by what you don't know. But questions are powerful even when you know the answer because it conditions them to think about the answer they want.

Id.

⁹² Involving the parties' lawyers in the discussion is also an indirect persuasion tactic. See, e.g., Kolb, *Strategy and Tactics*, *supra* note 27, at 258–59 (noting that mediators refer questions to the parties' lawyers on the assumption that the parties would be more receptive to information coming from someone they perceive as an expert and trustworthy figure, and whose interests are not seen to be in conflict with their own).

⁹³ See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I(A)(2) (2005), [available at](http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf) http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf (Approved by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution.).

⁹⁴ See, e.g., Kolb, *Expressive Tactics*, *supra* note 27, at 16–17.

⁹⁵ See, e.g., FISHER ET AL., *supra* note 60, at 81–94.

⁹⁶ See, e.g., John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1, 72 (1997).

EXPLORING THE CONCEPT OF POWER IN MEDIATION

this "information engineering" would contribute to a better atmosphere and to further concessions at a later stage of mediation.

One technique which draws heavily on informational power is holding separate meetings with the parties. Caucuses are called by mediators for many reasons; for example, in order to receive sensitive or confidential information from a party; to pass such information to a party; to make evaluation; to review options; and so on.⁹⁷ Mediators make use of these meetings to control the content and timing of the information communicated to the parties, and sometimes to manipulate the information in order to further the process.⁹⁸ Mediators might keep to themselves, or postpone, information they learned about in caucus which they suspect could harm the progress of mediation, in order to give the process a chance and give that party an opportunity to relax its demands without driving the other party out of mediation.

G. Environmental Manipulation Power

The ability of one person to manipulate the environment of another is power, since such a change of surroundings would make the other person respond to the new situation.⁹⁹ The ability of mediators to affect the circumstances in which mediation takes place results in power which might be used to influence the parties and strengthen mediators' other sources of power. For example, mediators usually determine the place of mediation. The decision to hold the sessions at their offices or at a venue of their choice gives them a psychological advantage.¹⁰⁰ In addition, mediators control the sitting arrangements (where the mediator and each party sit, height differences between the mediator's chair and the parties', etc.) which establish their role as the managers of mediation and enlarge their position power.

⁹⁷ See, e.g., BOULLE & NESIC, *supra* note 1, at 136.

⁹⁸ See, e.g., MOORE, *supra* note 1, at 375 (noting that "[c]aucuses give mediators the greatest opportunity to manipulate parties into an agreement because disputants do not have the advantage of face-to-face communication to test the accuracy of information exchanged."); Cooley, *supra* note 96, at 6, 70-72.

⁹⁹ See Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 222 (referring to environmental or ecological manipulation as "less direct methods of influence").

¹⁰⁰ See, e.g., Michael Meltsner & Philip Schrag, *Negotiating Tactics for Legal Services Lawyers*, in STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 18 (Little, Brown & Co. 2d ed. 1992) (advising negotiators to "[a]rrange to negotiate on [their] own turf").

Mediators could change not only the parties' physical surroundings, but also the procedure of mediation. Control over process is a powerful tool of influence.¹⁰¹ Mediators could determine: which party talks first¹⁰²; set an agenda¹⁰³; how much time is spent on each topic; whether to disregard certain issues¹⁰⁴; whether to postpone discussion in certain issues¹⁰⁵; whether to hold separate meetings and on their timing¹⁰⁶; and so on. These interventions influence the behavior of the parties and the content of mediation.¹⁰⁷ For example, the decision to hold separate meetings prevents direct communication between the parties and passes control over communicated messages to the mediator.¹⁰⁸

Mediators' power to manipulate the environment of mediation includes their ability to control time in mediation. Time in negotiation and mediation is an important resource for all the participants in the process.¹⁰⁹ It empowers the parties because it enables them to prepare for the negotiation, collect information, create alternatives, consider options, etc.¹¹⁰ Conversely, lack of time or time pressure could weaken a party who finds himself in such a

¹⁰¹ See Shapira, *supra* note 7, at 256–57.

¹⁰² See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1585 (1991) ("The mediator . . . can set the rules regarding who talks, when they may speak, and what may be said").

¹⁰³ See, e.g., KOVACH, *supra* note 1, at 37 ("In complex cases, the mediator may also want to set an agenda, that is, determine which issues will be dealt with in a specific order, using a variety of agenda setting strategies"). See also *id.* at 183–184; MOORE, *supra* note 1, at 244.

¹⁰⁴ See, e.g., Silbey & Merry, *supra* note 27, at 16–17.

¹⁰⁵ See, e.g., BOULLE & NESIC, *supra* note 1, at 26.

¹⁰⁶ See, e.g., MOORE, *supra* note 1, at 369–71.

¹⁰⁷ See, e.g., Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 31 n. 123 (2003) ("The decision about who speaks first can have a powerful effect on determining the dominant 'story' of the dispute for purposes of the mediation."); BERNARD MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER'S GUIDE* 58 (2000) ("The ability to define the issues and the potential outcomes in a conflict is a crucial source of power...The framing of a conflict is often the key to how it is resolved").

¹⁰⁸ See, e.g., Silbey & Merry, *supra* note 27, at 14.

¹⁰⁹ See, e.g., MOORE, *supra* note 1, at 378 (time as a resource); *Id.* at 323–26 (the consequences of deadlines on the parties).

¹¹⁰ See, e.g., ROBERT COULSON, *FAMILY MEDIATION: MANAGING CONFLICT, RESOLVING DISPUTES* 94 (2d ed. 1996) ("The ability to plan, set priorities, anticipate actions, and develop a bargaining strategy can also lend power to negotiator."); MOORE, *supra* note 1, at 324 ("For some parties, a delay in decision making may result in increased benefits, whereas for others a rapid decision may be essential.").

situation and make it easier to extract concessions out of him.¹¹¹ Mediators can devise a time pressure situation by setting a dead-line for mediation.¹¹² Time pressure might influence the parties to make decisions in a hurry and compromise.¹¹³ Alternatively, mediators can create a relaxed environment in which the parties have the time to collect relevant information, get to know the other side, weigh available alternatives, and make a truly voluntary and informed decision.¹¹⁴

H. *Third Parties' Power*

In some cases one can rely on the power of others, with whom one can associate oneself, and by doing so extend one's own powers. Where this is the case, one can then attempt to influence another person by "invoking the power" of these third parties.¹¹⁵

Mediators utilize the power of third parties when they emphasize their relation to court, when they remind the parties that they are court-appointed mediators, or when they mention professional or personal ties with judges. By doing so, mediators present themselves as representatives of some larger authority and enhance their position power.¹¹⁶

Mediators also invoke the power of third parties by mentioning names of professionals who are known to those who work in the relevant field and to

¹¹¹ See, e.g., COULSON, *supra* note 110, at 94 ("A party who is constrained by time may lose bargaining power to a more patient negotiator. If an adversary can be persuaded to accept a time limit, the pressure is on.").

¹¹² In creating time pressure, mediators would usually use legitimate power (their position power as managers of the process to set time tables). Where time pressure is inconvenient for the parties (i.e. seen by them as a negative event) it could be perceived by them as an exercise of mediator's coercive power.

¹¹³ See, e.g., MOORE, *supra* note 1, at 328 (use of deadlines by mediators to further agreements).

¹¹⁴ See, e.g., Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 819-20 (1999) (on genuine consent to outcome in mediation).

¹¹⁵ See Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 222 (referring to the act of invoking the power of third parties as a means of influence).

¹¹⁶ See, e.g., Silbey & Merry, *supra* note 27, at 27 ("[the mediator] presents him/herself as a representative of some larger authority. The mediator wraps him or herself in the same mystical cloth as the jurist, the rabbi or the priest; and, while not proclaiming openly that he is the embodiment of the law or God, he nevertheless proclaims access to knowledge and wisdom derived from a special school of trained neutrality. He dispenses decisions, which from the perspective of the contending parties carry the same kind of authoritative weight as the law or God.").

the parties or their lawyers. Again, by mentioning people who are known and respected, mediators send a message that they can be trusted, as if those mentioned have recommended them.¹¹⁷

The power of third parties helps mediators to build a coalition in order to gain support for a certain idea or proposal.¹¹⁸ This tactic might be relevant where a mediation party consists of more than one person, in which case one member of that party can serve as a source of influence on another member. For example, in a dispute between a tourist resort and a family which has stayed at that resort, the mediator could build a coalition with the husband in order to influence the wife and vice versa. This would prove useful where, for example, the wife and husband differ on the terms of settlement.

Mediators also involve the parties' lawyers in the process (the "third parties" for our purpose) in order to gain support for their position and strengthen their expert and legitimacy power vis-à-vis the parties.¹¹⁹ Mediators do so by asking to hear the lawyers' expert opinion, by asking them to provide professional information, and by utilizing the trust between parties and their lawyers.¹²⁰

IV. THE COMPLEXITY OF THE PHENOMENON OF POWER

The previous Parts have focused on mediators in the analysis of the concept of power in mediation. Each of the potential sources of power has been described separately for purposes of clarity. In reality, however, the situation is more complex. Though it is correct, in the author's view, to treat power in mediation as a resource, it would be wrong to ignore the dynamic and changing dimension of power as a function of a specific situation, and of the relationship between the participants in mediation. In order to illustrate that complexity, this Part discusses general characteristics of power which are important for an understanding of the phenomenon of power, and Part V briefly describes the power bases of the parties in mediation.

¹¹⁷ See Kolb, *Expressive Tactics*, *supra* note 27, at 20.

¹¹⁸ See Kipnis et al., *supra* note 26, at 446, 448 (discussing coalition as an influence tactic in the work place).

¹¹⁹ In some cases mediators might approach an external expert or refer the parties to one. See, e.g., Lavinia E. Hall, *Eric Green: Finding Alternatives to Litigation in Business Disputes*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS*, *supra* note 86, at 279 (mediator Green suggesting that a party and his lawyer consult an expert who would be able to give a more objective perspective on the case's strengths and weaknesses and its likelihood of success in litigation).

¹²⁰ See also Kolb, *Strategy and Tactics*, *supra* note 27, at 258-59 (the contribution of the parties' lawyers' to mediators' informational power).

EXPLORING THE CONCEPT OF POWER IN MEDIATION

A. *Power can be built up.*

Power is not a constant, unchangeable fact.¹²¹ It is possible to extend a power base, and a power holder can take steps to improve his power position.¹²² For example, mediators can enhance their expert power by training, by learning, by using professional terminology, by adopting a formal dress code, and by mentioning rich professional experience.¹²³

B. *Power is relative.*

Use of power is a form of social interaction between people.¹²⁴ It should therefore be studied in the context of the relationship between the person who exerts power and the person who is the target of influence. In other words, the power possessed by one person should be examined in relation to the power sources of the other person against whom an influence attempt is made.¹²⁵ The margin of power between the two persons determines the degree of potential influence of each person in relation to the other. This potential changes according to the specifics of the relationship because power is situation-dependant and one may be powerful in one situation and powerless in another.¹²⁶ For example, the power position of a mediator who is also a practicing lawyer is superior in terms of expert power to the power position of layman parties who have no legal knowledge. However, his power position is less obvious in relation to the parties' lawyers, and accordingly his potential influence more limited.

¹²¹ See, e.g., Hughes, *supra* note 3, at 575.

¹²² See Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 223. See also Samuel B. Bacharach & Edward J. Lawler, *Power Dependence and Power Paradoxes in Bargaining*, 2 NEGOT. J. 167, 168-69 (1986).

¹²³ See, Kolb, *Expressive Tactics*, *supra* note 27, at 15.

¹²⁴ See, e.g., MAYER, *supra* note 107, at 51.

¹²⁵ See Coleman, *supra* note 17, at 111-12; JAMES T. TEDESCHI ET AL., *CONFLICT, POWER AND GAMES: THE EXPERIMENTAL STUDY OF INTERPERSONAL RELATIONS* 51 (1973).

¹²⁶ See Coleman, *supra* note 17, at 124; See also, MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT* 84-85 (1977) ("Power is a relational concept; it does not reside in the individual but rather in the relationship of the person to his environment. Thus, the power of an actor in a given situation is determined by the characteristics of the situation as well as by his own characteristics.").

C. Power has a subjective dimension.

A factual examination of one's position might reveal a power source which could be verified objectively. For example, a lawyer can point to his law degree as evidence for his expert power base. But this objective test is not conclusive. It is crucial to know how the power holder is perceived by the one he attempts to influence.¹²⁷ It is quite possible that one ascribes more (or less) power to the other person than he actually has.¹²⁸ For example, one party may (subjectively) believe the mediator to be an expert in the subject matter of the dispute where in fact he is wrong and the mediator is not such an expert. But the objective fact that the mediator is not a subject matter expert does not reduce the amount of expert power attributed to him by that particular party, and the potential influence associated with it.¹²⁹

D. Power bases are used simultaneously.

The exertion of power could rely on several power bases at the same time.¹³⁰ It is not necessary for each influence attempt to stem from a single power base.¹³¹ For example, a professional giving advice could invoke both expert power (his special, superior knowledge), position power (his status and authority), and informational power (the facts supplied).

E. The use of power is dynamic.

Only rarely would use of power be a one time, unilateral attempt to influence. The dynamic aspect of power is manifested in a continuing process of power use and counter power use, whereby the one who has employed power in order to influence the other then faces a counter influence attempt intended to resist the original influence attempt. As a result, the power relations between the interacting parties are indeterminant and ever changing.¹³² The one who has used power first to influence another now

¹²⁷ See MAYER, *supra* note 107, at 58; Coleman, *supra* note 17, at 123.

¹²⁸ See MAYER, *supra* note 107, at 58; Coleman, *supra* note 17, at 125.

¹²⁹ See also BOULLE & NESIC, *supra* note 1, at 170 ("the mere presence of a mediator may, in the subjective perception of some disputants, constitute a source of pressure to settle, while others may feel no threat from aggressive mediator behaviour").

¹³⁰ See, e.g., Hughes, *supra* note 3, at 576.

¹³¹ See, e.g., *id.* ("The same act may exercise or surrender power in more than one category [of power].").

¹³² See, e.g., Bacharach & Lawler, *supra* note 122, at 173; See also William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in*

becomes the influenced party and so on. It is an ongoing and dynamic process which makes the concept of power within social relations highly sophisticated and complex. Thus, returning to mediation, all participants in mediation should be viewed on this dual basis as both power holders seeking to influence other participants and influenced targets facing influence attempts by other participants. True, mediators use their power bases to influence the parties. But at the same time the parties use their own power bases to resist the mediators' influence attempts, to block influence attempts made by other parties, and to influence the other participants.¹³³

F. Power and use of power should be distinguished.

It is important to note that the fact that power exists does not necessarily mean that it would or should be used. The use of power is a matter of choice, and the power holder might decide to refrain from using it or prefer to use one source of power rather than another.¹³⁴ Mediation is not an exception. Mediators might initially have those power bases discussed in Part III or could develop and extend them over the course of the mediation process. This is not to say that they have a free license to use their power on all occasions. The limits on such use of power may be legal, ethical, or practical.¹³⁵ Part V integrates these insights into an analysis of the sources of power of mediation parties and their power relations with mediators.

Lawyer-Client Interactions, 77 CORNELL L. REV. 1447, 1450 (1992) (noting, on the power relations between lawyers and clients, that "[p]ower in [lawyer-client] interactions is a complicated phenomenon that, over time, is constructed and reconstructed so that its possession is neither necessarily obvious nor rigidly determined. Indeed, it is probably more accurate to say that power is not possessed at all. Power is mobile and volatile, and it circulates such that both lawyer and client can be considered more or less powerful, even at the same time. Even to describe power as an 'it' implies more of an independent existence than we intend. It is better, perhaps, to view it as a dimension of relationships rather than a resource under someone's control.").

¹³³ For further discussion, see *infra*, Part V.

¹³⁴ On the choice between the bases of power and the means of influence see, e.g., Raven, *French and Raven Thirty Years Later*, *supra* note 20, at 228-33; DAVID KIPNIS, *TECHNOLOGY AND POWER* 20-23 (1990); Carnevale, *supra* note 27.

¹³⁵ Practical limits derive from common sense. For example as mediation is a voluntary process there would be no point in exercising power in a way which alienates the parties, leads to loss of trust in the mediator, and jeopardizes the parties' willingness to cooperate with the mediator.

V. ILLUSTRATING THE COMPLEXITY OF POWER IN MEDIATION: THE POWER RELATIONS BETWEEN PARTIES AND MEDIATORS

Part II examined mediators' sources of power, and influence tactics which are based on those powers. Mediators use power in their interactions with the parties and with other participants in mediation in order to change their behavior and positions. It was shown in Part IV that power is a complex phenomenon which needs to be studied in a given situation and in a given relationship. The outcome of use of power depends not only on the power holder but also on the influenced person and his sources of power.¹³⁶ The focus on mediators' power alone would be wanting without an understanding of the power possessed by those whom mediators attempt to influence. This Part discusses briefly the power sources of the parties in mediation. This article shall not expand on it because, as illustrated below, Part II dealt with mediators' power, and provided the reader with tools to carry on a similar analysis with respect to other participants in the process, be them the parties, their lawyers, a co-mediator, etc. This Part aims to illustrate the application of these tools to the parties' sources of power in their relationship with the mediator¹³⁷ and to enrich the analysis with some of the insights on the complexity of power described in Part IV.

Understanding the parties' sources of power is important for several reasons. First, it could contribute to a more effective use of power by mediators. A party holding a strong power position in relation to the mediator is more likely to be able to resist the mediator's attempt of influence and vice versa. Mediators who are familiar with the concept of power may be able to identify points of strength and weakness in the parties' and in their own structure of power and take steps to increase their influence potential by expanding their sources of power and by utilizing the parties' weaknesses. Second, identifying the parties' sources of power could increase mediators' awareness of power imbalances between parties and enable them to consider options for intervention such as balancing, empowerment, withdrawal, etc. Third, recognizing the parties' sources of power and power imbalances between mediators and parties intensifies the demand for ethical conduct on the part of mediators, and provides a strong reason for mediators' obligation

¹³⁶ See TEDESCHI ET AL., *supra* note 125, at 51 ("The successful exercise of power depends not only on the source's tactics, resources, and characteristics but also on the resources and characteristics of the person towards whom influence attempts are directed.").

¹³⁷ Similarly, analysis could be extended to the power and influence relations between the parties themselves. For such a discussion (using different terminology to describe the parties' sources of power) see, e.g., Hughes, *supra* note 3, at 574-75.

to follow fundamental principles of mediation, such as self determination, fairness, and neutrality.¹³⁸

Following the terminology offered in Part II, a party in mediation has *coercive power* in their relations with the mediator if they can cause the mediator to accept what the mediator considers a negative outcome. For example, parties have the right to end mediation at any given moment.¹³⁹ Parties who threaten to leave mediation and end the process could cause damage to mediators who see their reputation as dependant on the production of mediated agreements or to mediators whose supply of cases from court depends on achieving such agreements.¹⁴⁰ Mediators in such a position might restrain their influence attempts in order to prevent the use of coercive power by the parties. Mediators who see their role differently¹⁴¹ or mediators who are not evaluated according to the number of mediated agreements arrived at would be less affected by such threats. In other words, the parties would not be able to rely on coercive power on those facts.

The parties' coercive power might be based on other grounds as well. For example, if the provision of mediation services is an important source of income for a mediator, the party's decision to discontinue mediation would cause a financial loss to the mediator.¹⁴² If a party has a close relationship with judges and businessmen with whom the mediator has professional relationship, the mediator might feel concerned of a negative outcome which the party could cause him. These examples emphasize the relative characteristic of power. The coercive power of a party in his interaction with

¹³⁸ For a discussion of mediation's fundamental principles see, e.g., Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001) (on self-determination in mediation); Nolan-Haley, *supra* note 114 (on informed consent); MOORE, *supra* note 1, at 53-54, Orna Cohen et al., *The Limits of the Mediator's Neutrality*, 16 MEDIATION Q. 341 (1999) (on neutrality); Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909 (1998) (on fairness).

¹³⁹ See, e.g., MODEL STANDARDS, *supra* note 93, Standard I.A.

¹⁴⁰ A court appointed mediator who is not producing mediated agreements might be considered inefficient and the supply of court cases to him might suffer. On the emphasis on efficiency in court connected mediation see, e.g., Silbey & Merry, *supra* note 27, at 30; BUSH & FOLGER, *supra* note 1, at 71, 105; Patricia L. Franz, *Habits of a Highly Effective Transformative Mediation Program*, 13 OHIO ST. J. ON DISP. RESOL. 1039, 1040 (1998).

¹⁴¹ See, e.g., Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67, 85-95 (2002) (discussing the role of transformative mediators).

¹⁴² See, e.g., WHEN TALK WORKS: PROFILES OF MEDIATORS, *supra* note 86, at 480 (noting that some mediators pursue mediation as a livelihood).

a specific mediator could be small or large depending on the circumstances of the *mediator* (e.g., his dependence on income from mediation practice). Further, the coercive power of one party in his interaction with a given mediator would be different than the power possessed by another party depending on the circumstances of the *party* (e.g., his social acquaintances).¹⁴³ Moreover, the subjective characteristic of power could mean that a mediator who is aware of the circumstances of a party (e.g., his social acquaintances) would attribute him coercive power as opposed to another mediator who is unaware of those facts or who is well connected himself and therefore does not consider the party as having coercive power.¹⁴⁴

The parties' *reward power* in their interaction with mediators is dependant on their ability to cause positive outcomes to the mediator.¹⁴⁵ Thus, for example, if the mediator believes that the parties could provide him with work in the future, the parties have reward power. Where a close relationship develops between a party and mediator, it could establish a personal reward power enabling the party to exert influence on the mediator based on that relationship.

Mediation parties, like mediators, might possess *expert power*, thus affecting the mediator-parties power relations. In a situation where one of the parties is an experienced lawyer, the expert power which a lawyer-mediator would be able to employ in the interaction with that party would be more limited than in a case where the party does not have legal education or immediate access to a legal expert.¹⁴⁶ Where the mediator is not a lawyer, and belongs to a different profession, the balance of power in the area of legal expertise would tilt against the mediator. He would have to exert influence based on other power sources such as expert power in conflict management (his superior knowledge on how to communicate and negotiate effectively in conflict situations) and position power (his authority to make decisions relating to the management of the process).

Continuing the example, assume that the party is an expert in a field not relevant to the dispute (for example he is a famous professor of physics or a movie star or a political figure). This party brings to mediation his social status which the mediator might find hard to ignore. In such a case the party

¹⁴³ On the relative characteristic of power *see supra* Part IV.B.

¹⁴⁴ On the subjective dimension of power *see supra* Part IV.C.

¹⁴⁵ *See supra* Part III.B for the definition of reward power

¹⁴⁶ This analysis applies to parties' lawyers as well. The mediator's power position vis-à-vis the representing lawyer would be weaker than his power position vis-à-vis a layperson party.

might enjoy *position power*, which places him above the mediator in the hierarchical social ladder. As a consequence, the party could manifest more resistance to the mediator's influence attempts and enjoy an improved power position from which to influence the mediator himself.

In an opposite scenario, we might find a powerless party who relies on his *weakness power* in the interaction with the mediator in order to manipulate the mediator into helping him or taking his side. Being seen as weak could play for a party by providing him with an influence potential based on the mediator's feeling of obligation to assist the weak. However, it should be noted that the weaker party is running a risk that he would be perceived as one whose ability to resist influence is more limited. Such perception might be translated by mediators to pressure in an effort to extract concessions which would further the negotiation—a tactic which mediators who see their main role as securing an agreement might prefer to exerting pressures on the party who is perceived as stronger (and therefore more resilient to pressures and less likely to yield concessions). This example illustrates again the element of choice in the exercise of power.¹⁴⁷ The power position of the mediator in his relations with the parties is a factual question. His decision whether to make use of that power position, and for what purpose, should be subjected to normative scrutiny according to the rules and principles of mediation ethics.

A party who is successful in making the mediator feel that they both share similar values, beliefs, activities, or other similarities can establish *referent power*.¹⁴⁸ It is also possible that the mediator would see the party as a model figure to be admired or followed, for example where the party is a successful businessperson or of great intellect. In these cases the mediator's feelings might serve as a basis for the use of referent power by the party to affect the mediator's behavior in favor of that party.

Information is a source of power for the parties in their relationship with mediators in the sense that the parties have a first hand knowledge of the facts relevant to the dispute, and they can choose either to reveal the information to the mediator or to hide it.¹⁴⁹ The parties make use of the information and present it in a way that portrays their case in a better light than the other party's case, and thus affect the mediator's behavior. In addition, informational power can be enhanced by rhetoric. Rhetoric is the way one expresses oneself and good rhetorical skills can enhance one's

¹⁴⁷ See *supra* Part IV.F.

¹⁴⁸ See *supra* Part III.D for the definition of referent power.

¹⁴⁹ See, e.g., Cooley, *supra* note 96, at 6.

control of the meaning given to the unfolding story.¹⁵⁰ Mediation, as opposed to litigation, enables the parties to tell their stories expansively, without rules on impermissible evidence (which would reject, for example, hearsay), and mediators routinely encourage parties to clarify their views and feelings and to supply additional information they see fit.¹⁵¹ In that respect, mediation gives an advantage and power to parties who know how to tell a story in a lively, interesting, and convincing manner.¹⁵² As a result, the better story teller has a greater influence potential on the mediator and on the process and outcome of mediation.¹⁵³

Parties who mention to the mediator their acquaintance with influential figures (such as judges, politicians, or businesspersons) attempt to establish a linkage between those figures and themselves and to invoke the power of these persons (the *power of third parties*) in their interaction with the mediator. The party who utilizes the power of third parties would thus enjoy a spillover of potential influence.¹⁵⁴

This short discussion of the parties' power in relation to mediators concludes with an emphasis on the importance of context in the analysis of the concept of power in mediation and the inevitable weakness of any discussion of power in generalities.¹⁵⁵ The parties' power in this Part of the article and mediators' power in Part II have been discussed in relatively general terms. The analysis offered has dealt with mediators and parties in general, in order to suggest working concepts and definitions which can then be applied to specific persons and in specific scenarios. As has been noted, the reality of the use of power is complex, and power positions and power

¹⁵⁰ See Randy Frances Kandel, *Power Plays: A Sociolinguistic Study of Inequality in Child Custody Mediation and A Hearsay Analog Solution*, 36 ARIZ. L. REV. 879, 895 (1994).

¹⁵¹ *Id.* at 896–97.

¹⁵² *Id.* at 895.

¹⁵³ See *id.* at 896 (“Some parents are much better at meeting the rhetorical burdens of mediation than are others. In reading and re-reading the texts of the mediation narratives it became obvious to me that those parents who seemed to ‘tell a better story’ garnered the mediator’s support behind them and prevailed more often on the terms of the agreement.”).

¹⁵⁴ See *supra* Part III.H for the definition of third parties' power.

¹⁵⁵ See also LEWICKI ET AL., *supra* note 23, at 193 (pointing out, in the context of power in negotiation, that: “[i]t would be nice to be able to . . . delineate a comprehensive review of the power sources available to negotiators, the major configurations of power bases assembled as influence strategies, and the conditions under which each should be used. Unfortunately, such a task is not just daunting but impossible for two principal reasons . . . not only do the key actors and targets change from situation to situation, but the context in which the tools of power operate changes as well.”).

EXPLORING THE CONCEPT OF POWER IN MEDIATION

relations are dynamic and constantly changing. This complexity is appreciated once discussion of the power of mediators and parties in general, static, frozen scenarios is replaced with discussion of the power of *specific* mediators and parties in a given *dynamic* situation.

To illustrate this point, take for example a scenario in which the mediator tries to build rapport through small talk, showing interest in the parties, and expression of empathy, i.e., use of referent power. A more detailed analysis would examine the personal characteristics of the mediator and the parties and inquire whether there are similarities between them in terms of personality, culture, or habits which could contribute to the scope of that power base. In addition, one should realize that the mediator's influence attempt is not a single one but a series of attempts which repeat themselves in different forms throughout mediation. These attempts might fail, resulting in the parties (or one party) keeping the mediator at distance. It is also possible that at one point the cumulative effect of these attempts would win the parties' trust and place the mediator in a better power and influence position in relation to the parties.

Take the scenario where the mediator suggests to the parties at the end of one session a proposal based on his experience and professional knowledge, i.e., on expert power. Examination of the particular circumstances of the mediator and the parties reveals that this mediator is perceived by the parties as an excellent lawyer and that the parties, who are unrepresented, lack legal knowledge thus placing the mediator at a superior (expert) power position. At the next session it appears that one of the parties has consulted a lawyer regarding the proposal, and he now presents reasons for dismissing the mediator's proposal and for accepting a different option. The mediator's power position has been eroded. The party who has consulted an external expert fortified his power position by the information he collected (constructing informational power), and the invocation of the (third party) expert power of the consulted lawyer. In this evolving scenario the party has become a power holder who exercises influence on the mediator and the mediator has become the target of an influence attempt. This interaction repeats itself again and again as part of a cycle of sophisticated and continuing mutual influence attempts.

VI. CONCLUSION

A meaningful discussion of power in mediation requires a clear and uniform terminology. The terminology provided in this article could be applied not only to the power relationship between mediators and parties, but also to the relationship between the parties themselves, and to the relationship between mediators and the parties' lawyers.

The analysis provides a starting point for mediators who wish to examine their power sources and consider how to enlarge their power and make more efficient use of it. The author submits that familiarity with the bases of power would enable mediators to better understand what they actually do and how they can do it better. This analysis enables each mediator to find out what his sources of power are, which of his bases of power are of relative strength, and which should be further developed. In addition, mediators can use this analysis to better understand the sources of power of the participants in mediation and plan ahead their strategy of intervention and choice of influence tactics. In this respect, the article suggests an educational tool which could be implemented by practicing mediators as well as by candidates participating in mediators' training programs.

It is important that mediators' work is transparent and that the parties know before they enter mediation how it is conducted and how mediators operate.¹⁵⁶ Mediation is based on a principle of informed consent, and consent would be harmed if parties were not aware of mediators' power.¹⁵⁷ The analysis offered in this article emphasizes the idea that even though mediators lack the formal power to impose an outcome on the parties, they are still powerful professionals who use a variety of powers in the exercise of their professional role, and have considerable influence on the parties, the process, and its outcome. Parties should be aware of this fact and take it into consideration when they make the decision whether to enter mediation and participate in it, and also during mediation when they discuss with the mediator the dispute, proposals for concessions, options for settlement, etc. Without this awareness the parties consent would not be informed and real.

Awareness to mediators' power could make parties, and those who represent them in mediation, more alert to mediators' conduct and contribute to a better protection of the parties' rights. Unfortunately, there are mediators who abuse their power, put pressure on parties, manipulate information, and try to impose agreements.¹⁵⁸ Mediation is conducted in private and under a cover of confidentiality and privilege.¹⁵⁹ These conditions contribute to the

¹⁵⁶ See, e.g., Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1, 44-50 (1997) (on transparency in mediator-parties relationship).

¹⁵⁷ See, e.g., Nolan-Haley, *supra* note 114 (on the principle of informed consent in mediation).

¹⁵⁸ See, e.g., Shapira, *supra* note 7, at 260-61 (discussing the use of pressure tactics by mediators and referencing relevant literature).

¹⁵⁹ See, e.g., Folberg & Taylor, *supra* note 1, at 263-80; KOVACH, *supra* note 1, ch.11.

EXPLORING THE CONCEPT OF POWER IN MEDIATION

unique nature of mediation and its success¹⁶⁰ but could also lead to abuse of the process.¹⁶¹ Unlike litigation, mediation is not subject to robust external supervision through publicity, documentation of proceedings, and a built-in option for appeal. In addition it is also very difficult to sue mediators successfully.¹⁶² In these circumstances it is of special importance to raise awareness to mediators' power and to influence their tactics in order to extend the possibility of internal supervision by the participants in mediation on the mediators' use of power. Awareness to power and its consequences could also assist conscientious mediators who wish to reflect on the appropriate limits of use of power in mediation.

Finally, exposing the element of power in mediators' work and in their relations with the parties as a factual issue inseparable from their professional conduct is a first step in setting the ground for an ethical analysis of power use in mediation. Such normative analysis might assist in the search for the appropriate limits of the use of power by mediators and suggest guidance to mediators, parties, and other participants in mediation.

¹⁶⁰ See, e.g., WILLIAM E. SIMKIN, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* 33 (1971); Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 445 (1984); Lawrence Freedman & Michael Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 37–38 (1986).

¹⁶¹ See, e.g., NANCY ROGERS & RICHARD SALEM, *A STUDENT'S GUIDE TO MEDIATION AND THE LAW* 65 (1987) (cautioning that lawyers might abuse mediation for discovery); Paula M. Young, *Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 OHIO ST. J. ON DISP. RESOL. 721, 748–55 (2006) (referring to complaints filed against Florida mediators which include allegations of failure to maintain confidentiality). See also Young, *supra* at 760–62 (breach of confidentiality complaints against Virginia mediators); Young, *supra* at 765 (breach of confidentiality complaint against Georgia mediator).

¹⁶² See, e.g., Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 150–51 (2003); Young, *supra* note 161, at 743–45.

